No. 09-38

In the Supreme Court of the United States

HEALTH CARE SERVICE CORPORATION, PETITIONER

v.

JULI A. POLLITT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Federal Employees Health Benefits Act (FEHBA), 5 U.S.C. 8901 *et seq.*, completely preempts—and therefore makes removable to federal court—a state-court suit challenging enrollment and health benefits determinations that are subject to the remedial scheme established under FEHBA.

2. Whether the federal officer removal statute, 28 U.S.C. 1442(a)(1), which authorizes removal to federal court of a state-court suit brought against a person "acting under" a federal officer when sued for actions "under color of [federal] office," encompasses a suit against a government contractor administering a FEHBA plan for actions taken pursuant to the government contract.

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INTEREST OF THE UNITED STATES

Pursuant to the Federal Employees Health Benefits Act of 1959 (FEHBA), 5 U.S.C. 8901 *et seq.*, the Office of Personnel Management (OPM) enters into contracts with insurance carriers to provide health benefits to federal employees, annuitants, and their dependents. The United States has a substantial interest in ensuring that the roles of OPM and private carriers under FEHBA are properly understood. Further, the United States has a substantial interest in the interpretation of the federal officer removal statute.

STATEMENT

1. The Federal Employees Health Benefits Act of 1959, 5 U.S.C. 8901 *et seq.*, establishes a comprehensive

health insurance program for federal employees. FEHBA confers broad authority on OPM to administer the program and to promulgate regulations necessary to carry out the statute's objectives. 5 U.S.C. 8901-8913. FEHBA does not grant OPM authority to offer health benefit plans itself, but rather grants it authority to contract with "qualified carriers" offering such plans. 5 U.S.C. 8902, 8903.

The procedure for processing enrollment and benefit disputes under the program has evolved over time. An employee may enroll in an OPM-approved plan by submitting a request to her employing agency, for either individual or for "self and family" coverage. 5 U.S.C. 8905(a); 5 C.F.R. 890.102. Prior to 1994, the employing agency made the initial enrollment determination, subject to review by OPM. 5 C.F.R. 890.104 (1994). Now the employing agency makes both the initial and the final decision, 5 C.F.R. 890.104, subject to OPM's corrective authority, 5 C.F.R. 890.103(b). Under the current regulations, as before, any "suit to compel enrollment under 5 C.F.R. § 890.102 must be brought against the employing office that made the enrollment decision." 5 C.F.R. 890.107(a). That suit would be one under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*

Prior to 1975, the governing regulations did not provide any formal administrative process for resolving disputes concerning claims for benefits by plan enrollees. The Civil Service Commission (Commission), OPM's predecessor agency, provided an informal process under which the Commission entertained employee complaints about benefit denials by carriers and could ask the carrier to reconsider the claim. See *Health Benefits: Hearing Before the Subcomm. on Compensation*

and Employment Benefits of the Senate Comm. on Post Office & Civil Service, 93d Cong., 1st Sess. 69, 72 (1973). The regulations made clear, however, that the Commission "does not adjudicate individual claims for payment or service under health benefits plans, nor does it arbitrate or attempt to compromise disputes between an employee or annuitant and his carrier as to claims for payment or service." 5 C.F.R. 890.103(d) (1974). The regulations also provided that "[a]n action to recover on a claim for health benefits" could only "be brought against the carrier of the health benefits plan." 5 C.F.R. 890.104 (1974).

In 1974, Congress amended FEHBA to provide that each contract shall require the carrier to pay for or offer a health service in an individual case if the Commission determines that the individual is entitled to the benefit under the terms of the contract. Act of Jan. 31, 1974, Pub. L. No. 93-246, § 3, 88 Stat. 4; 5 U.S.C. 8902(j). Congress was concerned that "the Commission ha[d] no legal ground upon which to demand the carrier's compliance with their decision and the employee [wa]s forced into the courts if he [wa]s to recover his judgment." H.R. Rep. No. 459, 93d Cong., 1st Sess. 7 (1973).

Following the 1974 amendment, the Commission created a formal administrative process for review of carrier decisions denying benefits. 40 Fed. Reg. 4444 (1975). But the regulations continued to provide that only "the health benefits plan," and not the Commission, "adjudicate[s] individual claims for payment or service." 5 C.F.R. 890.105(a) (1976). And, in a section entitled "Legal actions," the regulations continued to require that any "action to recover on a claim for health benefits should be brought against the carrier of the health benefits plan." 5 C.F.R. 890.104 (1976). A 1986 amendment

to the regulation further explained that "an enrollee's dispute of an OPM decision solely because it concurs in a health plan carrier's denial of a claim is not a challenge to the legality of OPM's decision. Therefore, any subsequent litigation to recover on the claim should be brought against the carrier, not against OPM." 51 Fed. Reg. 18,565 (1986); 5 C.F.R. 890.107 (1987).

In 1996, however, OPM significantly revised the framework for review of benefit denials. See 61 Fed. Reg. 15,177-15,180 (1996). Under the current regulations, "[e]ach health benefits carrier resolves claims filed under the plan," and all covered individuals must first submit their claims to the carrier. 5 C.F.R. 890.105(a)(1). If the carrier denies the claim, the covered individual may ask for reconsideration. *Ibid.* "If the carrier affirms its denial," the individual may ask OPM to review the claim. *Ibid.* A suit to review OPM's final action involving denial of a claim must be brought against OPM, not "the carrier or carrier's subcontractors." 5 C.F.R. 890.107(c); see *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677, 686-687 (2006). That action is one under the APA. *Muratore* v. *United States OPM*, 222 F.3d 918, 920 (11th Cir. 2000). The individual must exhaust administrative remedies prior to bringing the suit, 5 C.F.R. 890.107(d)(1), and the remedy is "limited to a court order directing OPM to require the carrier to pay the amount of benefits in dispute," 5 C.F.R. 890.107(c).

2. Pursuant to 5 U.S.C. 8902(a), "OPM entered into a contract in 1960 with the [Blue Cross Blue Shield Association (BCBSA)] to establish a nationwide fee-for-service health plan, the terms of which are renegotiated annually." *Empire*, 547 U.S. at 684. Petitioner, like other BCBSA affiliates, administers the Blue Cross and

Blue Shield Service Benefit Plan (Plan) on behalf of BCBSA. Pet. Br. 3; J.A. 60.

Under the contract between OPM and BCBSA, an eligible employee who wishes to enroll in the Plan must make an election to do so. J.A. 33. If the employing agency finds the employee eligible, it notifies the carrier of the election. J.A. 33-34. The carrier is then required to provide benefits as specified in the Plan brochure, J.A. 35, which explains that the "Plan is underwritten by participating Blue Cross and Blue Shield Plans (Local Plans) that administer this Plan on behalf of [BCBSA]," J.A. 60. The contract also requires the carrier to attempt to recover benefits "paid in error." J.A. 40. It specifies a number of sequential steps that "shall" be followed to recover erroneous payments, beginning with providing notice to the enrollee and "an opportunity to dispute" the debt before proceeding with collection activities. J.A. 40-42.

3. Respondent Juli Pollitt is a federal employee and enrollee in the Plan. Pet. App. 1a, 5a. Respondent Michael Nash is her former husband and the father of her minor son, but he was not covered by the Plan at any relevant time. *Id.* at 5a. While employed by the Department of Energy (DOE), Pollitt maintained coverage for herself and her son. *Ibid.* According to the allegations in the complaint, in October 2003, Pollitt went on medical leave and her employer was changed for Plan purposes to the Department of Labor (DOL), J.A. 124, presumably to DOL's Office of Workers' Compensation Programs. At some point prior to July 18, 2007, petitioner allegedly reconciled its enrollment records with those of DOL and discovered a discrepancy in enrollment codes indicating that Pollitt had "Self-only" coverage and, thus, her son was not covered. Resp. Br. 4; see 5 C.F.R.

890.110(b) (requiring such reconciliation). Pollitt's coverage was then changed to exclude her son, retroactive to October 2003. J.A. 126. Following that change, petitioner sought reimbursement of benefits paid to providers for services rendered to respondents' son between October 2003 and July 2007. J.A. 127.

Respondents filed this action in Illinois state court, alleging that petitioner acted in bad faith by disenrolling their son retroactively and failing to give prior notice of attempts to recoup payments from medical providers. J.A. 77-83. They sought an order compelling petitioner to reinstate coverage for their son, as well as compensatory and punitive damages. J.A. 81-82. Shortly thereafter, DOE sent a letter to DOL stating that the retroactive change in enrollment was a mistake and that "[s]elf and [f]amily" coverage should be reinstated. J.A. 97, 102-103. DOL forwarded a copy of that letter to petitioner, which reinstated coverage. J.A. 84.

4. After coverage was reinstated, petitioner removed the case to federal court under 28 U.S.C. 1441 on complete preemption grounds, as well as under the federal officer removal statute, 28 U.S.C. 1442(a)(1). J.A. 85-104. In a second amended complaint filed after removal, respondents alleged that petitioner had not rescinded its earlier attempts to recoup benefits. J.A. 123-133; Pet. App. 2a. The district court granted petitioner's motion to dismiss, concluding that the case was "properly removed from state court, that plaintiff Nash has no standing in this action, and that plaintiff Pollitt's claims are preempted and precluded by federal law." *Id.* at 8a.

5. The court of appeals vacated and remanded for further proceedings. Pet. App. 1a-4a. Citing *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, *supra*, the court first held that there was no federal removal juris-

diction on complete preemption grounds because *Empire* "holds that federal law does not completely occupy the field of health-insurance coverage for federal workers." Pet. App. 3a.

The court held that the case might nevertheless be removable under 28 U.S.C. 1442(a)(1), which allows removal by a person "'acting under' a federal officer." Pet. App. 3a (citation omitted). The court noted that petitioner "insists that it did nothing but carry out [DOL's] instructions," while "Pollitt maintains that [petitioner] acted unilaterally in concluding that her coverage was for self only rather than self and family," as well as in attempting to recoup past benefits. *Ibid.* The court remanded for an evidentiary hearing. *Id.* at 4a. It explained that if petitioner did nothing but follow agency orders, then "the case belongs in federal court and must be dismissed" because "suits related to a federal agency's health-benefits-coverage decisions must name as the defendant [OPM] or the employing agency rather than the insurance carrier." *Ibid.* But if the agency did not direct the coverage change, the court continued, the case should be remanded to state court where the preemption defense would "be a subject for the state court's consideration." *Ibid.*

SUMMARY OF ARGUMENT

I. A. A civil action filed in state court may be removed to federal court if the plaintiff's claim "aris[es] under" federal law. 28 U.S.C. 1331, 1441(a) and (b). Whether a claim arises under federal law is governed by the well-pleaded complaint rule, which requires the federal question to appear on the face of the complaint. The "complete preemption" doctrine permits removal of purely state-law claims if a federal statute has created an exclusive federal cause of action, and the plaintiff's

state-law claims fall within the scope of that cause of action. Complete preemption is different in kind from ordinary, defensive preemption; under the former, the question is whether there is an exclusive federal statutory cause of action, not whether substantive federal law conflicts with, or even wholly displaces, state substantive law.

This Court has identified only three instances in which Congress has exercised such "extraordinary preemptive power" to support removal jurisdiction on complete preemption grounds. In all three circumstances, the federal statute that supplied the governing federal substantive law also provided an exclusive federal cause of action over which the district court had original jurisdiction.

B. In marked contrast, FEHBA does not create an exclusive statutory cause of action over which a federal district court would have original jurisdiction. The mere existence of an administrative remedy before OPM to challenge a carrier's denial of benefits does not give rise to complete preemption because it is not a judicial cause of action that could have originally been filed in federal court. And judicial review of OPM's final decision under generally applicable provisions of the APA is not the kind of "exclusive" federal statutory cause of action—*i.e.*, is not indicative of specific congressional intent to wholly displace state-law claims—sufficient to give rise to removal.

II. A. Section 1442(a)(1) grants removal rights to a federal agency or officer, as well as a private party "acting under" a federal officer. A private entity acts under a federal officer within the meaning of the statute only when it acts on behalf of the government, assisting in the performance of official duties or exercising dele-

gated authority. In those circumstances, removal gives the private party defendant a federal forum in which to raise defenses that arise from performing those official duties, and the purposes of the removal statute are furthered. Removal under Section 1442(a)(1) is most obviously implicated when private individuals are aiding law enforcement officers, but it is available whenever a private person is acting under delegated authority, or assisting the government in performing governmental functions.

B. A private contractor could be deemed to act under a federal officer, but only to the extent it is acting under delegated authority or assisting in performing governmental functions. Insurance carriers under FEHBA do not act under a federal officer for purposes of the removal statute. Carriers like petitioner enter into detailed contracts with OPM, but that does not transform the carrier from a private contractor into a federal agent. A FEHBA carrier does not perform delegated governmental functions, and does not assist OPM in performing its governmental duties. Rather, such a carrier remains in all respects a private insurance company, offering health insurance coverage and paying benefits to employees of the federal government under the terms of its contract.

ARGUMENT

I. FEHBA DOES NOT COMPLETELY PREEMPT RESPONDENTS' CLAIMS

A. The Complete Preemption Doctrine Permits Removal Only When A Federal Statute Creates An Exclusive Federal Cause Of Action

1. A civil action filed in state court may be removed to federal court if the plaintiff's claim "aris[es] under" federal law. 28 U.S.C. 1331, 1441(a) and (b). An action arises under federal law only when a federal question appears "on the face of the plaintiff 's properly pleaded complaint." *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987); see *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908). A defense is not part of a well-pleaded complaint; thus, when federal preemption is only a defense, as is ordinarily the case, preemption does not provide a basis for removal. *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 207 (2004). That is so "even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Rivet* v. *Regions Bank*, 522 U.S. 470, 475 (1988) (quoting *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 14 (1983)).

An "independent corollary" to that rule is the principle that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Franchise Tax Bd.*, 463 U.S. at 22. Thus, "if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Id.* at 24. In those circumstances, "a claim which comes within the scope of that [federal] cause of action, even if pleaded in

terms of state law, is in reality based on federal law." *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8 (2003).

2. The term "complete preemption" can be misleading; it differs from ordinary, defensive preemption not merely in degree, but in kind. Ordinary preemption, however pervasive or obvious, "does not transform the plaintiff's state-law claims into federal claims but rather extinguishes them altogether." *Rivet*, 522 U.S. at 476. It is only when an exclusive federal cause of action "wholly displace[s]" the plaintiff's state-law cause of action that the federal district court can exercise its "arising under" jurisdiction to adjudicate what is in fact (however it has been characterized) a federal claim. *Beneficial Nat'l Bank*, 539 U.S. at 8.

This Court has identified only three instances in which Congress has exercised the "extraordinary pre-emptive power" that supports removal jurisdiction on this theory. *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 65 (1987). First, in *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), the Court found that the "pre-emptive force" of Section 301 of the Labor Management Relations Act, 1974 (LMRA), 29 U.S.C. 185, was "so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" *Franchise Tax Bd.*, 463 U.S. at 23 (quoting 29 U.S.C. 185 and explaining the holding in *Avco*). Second, in *Metropolitan Life*, the Court held that Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(1)(B), displaced a state-law cause of action asserting improper processing of benefits claims under an ERISA plan. 481 U.S. at 60, 66-67; see *Davila*, 542 U.S. at 209. Finally, in *Beneficial National Bank*, the Court concluded that Sections 85 and 86 of the National Bank

Act, 12 U.S.C. 85, 86, "provide the exclusive cause of action" for usury claims against national banks and completely preempt any state-law cause of action. 539 U.S. at 11. In all three of those circumstances, the federal statute that supplied the governing federal substantive law also specifically provided an exclusive federal cause of action over which federal courts had original jurisdiction. See *id.* at 8-11; *Franchise Tax Bd.*, 463 U.S. at 23 (discussing *Avco*); *Metropolitan Life*, 481 U.S. at 64-66; *Davila*, 542 U.S. at 210.[1]

Congressional intent has always been "the touchstone of the federal district court's removal jurisdiction." *Metropolitan Life*, 481 U.S. at 66. In *Metropolitan Life*, the Court was "reluctant" to allow removal, but ultimately did so for two related reasons: because "the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of § 301 of the LMRA," which gave rise to complete preemption in *Avco*; and because the legislative history made clear that Congress adopted that language to benefit from "the *Avco* rule." *Id.* at 65-66. Subsequently, this Court in *Beneficial National Bank* clarified that the "proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive," not whether Congress intended the cause of action to be removable. 539 U.S. at 9 n.5; *id.* at 9 ("Only if Congress intended

[1] The federal cause of action does not need to "precisely duplicate[]" the state-law claim. *Davila*, 542 U.S. at 216. For example, a claim may fall within the scope of an exclusive federal cause of action, and thus be removable, even if a federal court cannot award the remedy sought. See *id.* at 209; *Caterpillar*, 482 U.S. at 391 n.4.

§ 86 to provide the exclusive cause of action * * * would the statute be comparable to the provisions that we construed in the *Avco* and *Metropolitan Life* cases.").

B. FEHBA Does Not Create An Exclusive Cause Of Action Giving Rise To Complete Preemption

To permit removal of respondents' suit based on the complete preemption doctrine would require a significant extension of that doctrine.

1. Unlike the LMRA, ERISA, and the National Bank Act, FEHBA does not provide any federal cause of action against anyone, much less an exclusive cause of action against the party (the carrier) that was the defendant in the state-court suit.

a. OPM regulations assign the employing agency the responsibility to make determinations concerning eligibility for enrollment and to receive elections from employees. If an employee is dissatisfied with her agency's final decision, she may seek judicial review. But that review is available not by virtue of a specific statutory cause of action created by FEHBA, but rather by operation of the generally applicable provisions of the APA which, subject to certain exceptions inapplicable to the FEHBA program, provide a cause of action to persons aggrieved by final agency action. 5 U.S.C. 702.[2] And that APA cause of action, of course, is against the agency, not the private insurance carrier. Moreover, an APA suit would challenge only the action of the agency

[2] The APA itself recognizes the distinction between a "special statutory review proceeding relevant to the subject matter," if one exists, and a more general cause of action for declaratory or injunctive relief against an agency "in the absence or inadequacy" of a special statutory review proceeding. 5 U.S.C. 703.

respecting the employee's eligibility for and election of coverage, not any actions of the carrier following its receipt from the agency of the notice of election.

b. With respect to claims for benefits, from the time FEHBA was enacted in 1959 until 1996, an employee's legal recourse if her carrier denied a claim was an ordinary breach of contract action against the carrier. See, *e.g.*, *Nitschke* v. *Blue Cross*, 751 P.2d 175 (Mont. 1988). That common law cause of action was not created by FEHBA; it arose merely from the carrier's status as a private insurer that had entered into an agreement. Indeed, a breach of contract action against the carrier remained the only judicial recourse even after OPM established in 1975 a formal administrative procedure to review denials of claims. Under *Beneficial National Bank* and its predecessors, because FEHBA provided no statutory cause of action against anyone, including the carrier, a suit challenging the carrier's denial of a claim under common law could not have been removed to federal court on complete preemption grounds.

OPM's revision of its regulations in 1996 does not change the outcome for complete preemption purposes. As before 1996, an employee who wants to challenge her carrier's denial of a claim for benefits may request review by OPM. And as before, if OPM concludes the claim should be paid, then under the contract the carrier is bound to pay. The primary change worked by the 1996 revision of the regulations is that if OPM concludes the claim was properly denied, a judicial action lies against OPM under the APA for an order requiring OPM to invoke its contractual right to direct the carrier to pay the claim. 5 C.F.R. 890.107(c). And, in light of the availability of that action against OPM under the APA, the regulations further provide that an employee

no longer may sue the carrier over the denial of a claim. *Ibid.* That regulation bars a state-court action against the carrier under ordinary preemption principles, thus requiring the dismissal of such a suit. But because FEHBA creates no exclusive federal statutory cause of action against the carrier (or, for that matter, against OPM) that would supplant the common law action, the necessary predicate for removal to federal court on complete preemption grounds is absent. There is, in other words, no statutory cause of action under FEHBA into which the state-law cause of action can be transformed. *Rivet*, 522 U.S. at 476.

2. As just explained, the lack of removal jurisdiction in this case follows from a straightforward application of *Beneficial National Bank* and its predecessors. There is nothing about the FEHBA program that warrants a departure from those principles.

a. The existence of an administrative remedy before OPM to challenge a carrier's denial of a claim does not give rise to complete preemption. Removal through complete preemption is premised on the proposition that, although pleaded under state law, the plaintiff's claims "necessarily 'arise under'" federal law, *Franchise Tax Bd.*, 463 U.S. at 24, and that the recharacterized federal claim "originally could have been filed in federal court," *Caterpillar*, 482 U.S. at 392. See *Rivet*, 522 U.S. at 476 ("A case blocked by the claim preclusive effect of a prior federal judgment differs from the standard case governed by a completely preemptive federal statute" because the "prior federal judgment does not transform the plaintiff's state-law claims into federal claims."). Because a right to seek administrative review by a federal agency is not a federal *judicial* cause of action that "originally could have been filed" in federal court, there

is no complete preemption. See *Sullivan* v. *American Airlines, Inc.*, 424 F.3d 267, 276 (2d Cir. 2005) (holding that the Railway Labor Act does not completely preempt state-law claims because "a state-law-based RLA minor dispute cannot be brought within the original jurisdiction of the federal courts and is thus not removable under § 1441"); *Lontz* v. *Tharp*, 413 F.3d 435, 442 (4th Cir. 2005) ("[T]he sine qua non of complete preemption is a pre-existing *federal* cause of action that can be brought in the district court."). To conclude otherwise would uncouple the complete preemption doctrine from its moorings and greatly expand its scope.

b. The same would be true if removal under the complete preemption doctrine were allowed based on the availability of judicial review under the APA following OPM's final administrative decision. Three factors, especially when considered together, compel that conclusion.

First, respondents' claims against the carrier do not come within the scope of the APA cause of action. An APA action is brought against OPM, not against the carrier, and the action challenges the final decision of the agency, not the carrier's denial of a claim prior to administrative review. The lack of identity of the defendants in the federal and state actions might not be dispositive in some other settings. But here, where the defendant in the federal action is an agency of the United States Government and the defendant in the state common law action is a private party, the Court should be especially reluctant to view as essentially the same a state-law claim against one party and a federal-law claim against another.

Second, a holding that an APA suit is the kind of "exclusive" federal cause of action that can support removal

on complete preemption grounds would vastly expand the reach of this judicial gloss on the federal jurisdiction statutes. As petitioner notes, the APA "presumptively" applies whenever there is a challenge to final agency action. Pet. Br. 18. The sweep of removal jurisdiction on petitioner's view thus would seem to encompass all cases in which some aspect of the state-law claim also could have been addressed to a federal agency (since, presumptively, all such matters would then be subject to judicial review under the APA). Acceptance of such a theory would expand the scope of federal jurisdiction beyond what Congress has authorized or this Court has countenanced, at the expense of the federal-state balance and in derogation of a plaintiff's ability, within the confines of the well-pleaded complaint rule, to frame her suit as she chooses.

Third, the existence of an APA cause of action against OPM is the consequence of regulations issued by OPM, not specific congressional design. Ordinarily, action by an Executive agency does not alter the jurisdiction of the federal courts. See *Carlyle Towers Condo. Ass'n* v. *FDIC*, 170 F.3d 301, 310 (2d Cir. 1999) (It has generally been thought "'axiomatic' that agencies can neither grant nor curtail federal court jurisdiction.") (quoting *Miller* v. *FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995), cert. denied, 517 U.S. 1155 (1996)); cf. *Kucana* v. *Holder*, No. 08-911 (Jan. 20, 2010), slip op. 16-17 (declining to read statute as delegating authority to the Executive to preclude judicial review).

3. Petitioner attempts to tease out congressional intent to create an exclusive federal cause of action sufficient to trigger complete preemption from three statutory provisions: (1) 5 U.S.C. 8912, which confers jurisdiction on the federal district courts, concurrent with

that of the Court of Federal Claims, over actions against the United States under FEHBA; (2) 5 U.S.C. 8902(j), which makes OPM benefit determinations binding on the carrier as a matter of contract; and (3) the 1998 amendment to 5 U.S.C. 8902(m)(1), FEHBA's express preemption provision. These arguments are unavailing.

Section 8912 was part of the 1959 Act, and has not changed in any material respect in the ensuing half-century. FEHBA, Pub. L. No. 86-382, § 15, 73 Stat. 716. In 1959, there were no FEHBA regulations at all—and certainly no regulations channeling challenges to carriers' benefit denials first to OPM and then to an action for judicial review against OPM under the APA. Section 8912 therefore cannot be read to suggest that Congress intended to limit benefit disputes under FEHBA to suits brought against the United States. Rather, as the Court explained in *Empire*, "[t]he purpose of this provision—evident from its reference to the Court of Federal Claims—was to carve out an exception to the statutory rule that claims brought against the United States and exceeding $10,000 must originate in the Court of Federal Claims." 547 U.S. at 686; see *id.* at 710 (Breyer, J., dissenting).

Nor did Congress, in enacting Section 8902(j) in 1974, intend to trigger complete preemption. Petitioner argues that the creation of OPM's administrative mechanism for review of claim denials was in response to Section 8902(j)'s "instruction," and was "plainly" designed to "implement Congress's intent." Pet. Br. 24, 41, 43. But the OPM review mechanism, as initially adopted in 1975, did not preclude covered individuals from suing carriers in court: indeed, it specified that any subsequent legal action was to be filed against the carrier, rather than OPM. OPM's subsequent regulatory deci-

sion that judicial challenges to benefit denials should be brought as suits against OPM in federal court can hardly suggest a congressional intent to that effect in 1974, more than two decades prior to the agency action.[3]

Finally, petitioner errs in relying on Congress's amendment in 1998 to Section 8902(m)(1), FEHBA's preemption provision. Under that provision, certain FEHBA contract terms supersede state or local law or

[3] The United States informed the Court of this regulatory decision in *Rocky Mountain Hospital & Medical Service* v. *Phillips*, 513 U.S. 1071 (1995). In that case, this Court granted certiorari to decide whether federal question jurisdiction existed over an action brought by a carrier seeking a declaration that it was not obligated to provide certain health insurance benefits under a FEHBA plan. The United States amicus brief described the jurisdictional issue as difficult because federal law would govern so much of the dispute, although it did not take a definitive position on the issue. See U.S. Br. at 12-18, *Rocky Mountain Hosp.*, *supra* (No. 94-555) (94-555 U.S. Br.) Instead, the United States suggested that dismissal of the writ would be warranted in light of OPM's recently promulgated interim regulations, see 60 Fed. Reg. 16,037 (1995), providing that an enrollee must sue OPM directly under the APA. 94-555 U.S. Br. at 8, 10-11. Because federal jurisdiction would clearly exist over such APA actions against OPM, and because any claim brought by an enrollee against the carrier (instead of OPM) in state or federal court would be preempted, the question presented ceased to have continuing importance. *Id.* at 23.

As particularly relevant here, the government explained that as a result of the new regulation, "[f]uture cases in which an enrollee sues a carrier for FEHBA benefits" likely will only raise a defensive preemption question—*i.e.*, whether the case "must be dismissed because it is preempted by the action for administrative review now available against OPM." 94-555 U.S. Br. at 23. Because "[t]hat is a simple, up-or-down preemption question * * * that state courts typically resolve successfully in other federal regulatory areas," concerns of "disuniformity" between "federal or state courts" would be minimal. *Ibid.* The *Rocky Mountain Hospital* case was dismissed before decision pursuant to Supreme Court Rule 46. 514 U.S. 1048 (1995).

regulations that "relate to health insurance or plans." 5 U.S.C. 8902(m)(1). The 1998 amendment deleted the following limitation on that provision: "to the extent that such law or regulation is inconsistent with such contractual provisions." H.R. Rep. No. 374, 105th Cong., 1st Sess. 22 (1997) (*House Report*). Petitioner contends that this amendment was meant to respond to lower court decisions denying removal on complete preemption grounds. Pet. Br. 29. But it seems far more likely that Congress intended to do just what the omission of the relevant text accomplished—broaden the extent to which FEHBA contract terms would preempt state or local substantive law relating to benefits.[4]

Nothing in the text of Section 8902(m)(1) speaks to the jurisdiction of the federal courts or to the remedial scheme, including APA review, that OPM created. And

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[4] Petitioner also overstates (Pet. Br. 28-29) the extent to which lower courts had relied on the limitation in Section 8902(m)(1) to reject complete preemption in FEHBA cases. For example, in *Goepel* v. *National Postal Mail Handlers Union*, 36 F.3d 306 (3d Cir. 1994), cert. denied, 514 U.S. 1063 (1995), the court did not rely on the relative breadth of the express preemption provision in ERISA, as compared to FEHBA; it instead explained that ERISA "contains a civil enforcement provision expressly authorizing ERISA beneficiaries to bring actions to recover benefits under an ERISA plan," whereas "FEHBA does not create a cause of action." *Id.* at 312. The two district court cases cited by petitioner (Pet. Br. 28) also noted that "FEHBA does not provide a civil enforcement provision to replace the preempted state law causes of action." *Transitional Hosps. Corp.* v. *Blue Cross & Blue Shield of Tex., Inc.*, 924 F. Supp. 67, 69 (W.D. Tex. 1996); see *Arnold* v. *Blue Cross & Blue Shield of Tex., Inc.*, 973 F. Supp. 726 (S.D. Tex. 1997) (same). If Congress had intended to trigger removal jurisdiction, it could have addressed that issue directly, either by creating a federal cause of action or by amending the removal statute; Congress would not likely have chosen simply to delete language from the express preemption provision, with no mention at all of jurisdiction.

the legislative history makes no mention of the federal administrative remedy. As petitioner notes, the committee reports did speak of encouraging "uniformity" and "completely displac[ing]" state law, Pet. Br. 28-29, but that is relevant to the scope of substantive preemption —*i.e.*, whether FEHBA "contract terms" should "displace" all (not just conflicting) state substantive law, rather than whether a federal cause of action "displaces" a state-law cause of action.

The only language touching on federal jurisdiction, as opposed to substantive preemption, is a passing statement that the "change will strengthen the case for trying FEHB program claims disputes in Federal courts rather than State courts." *House Report* 9. But, as then-Judge Sotomayor explained, "it is something of a mystery what the authors of the report meant * * * [g]iven that (1) section 8902(m)(1) is by its plain and unambiguous terms a preemption provision and not a grant of jurisdiction, and (2) the legislative history provides only limited and equivocal support for a contrary conclusion." *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 396 F.3d 136, 149 n.16. (2d Cir. 2005), aff'd, 547 U.S. 677 (2006). And in fact by the time of the amendment, OPM regulations already provided for "FEHB program claims disputes" to be heard "in Federal courts rather than State courts," *House Report* 9, as a result of the 1996 regulations providing for actions against OPM under the APA. The single comment in the House Report therefore falls far short of "strongly support[ing]" complete preemption, Pet. Br. 29-30. See *Empire*, 547 U.S. at 698 (if "Congress intends a preemption instruction completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear").

4. Petitioner also relies on *Empire*, in conjunction with *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), to argue that there is a strong federal interest requiring uniform rules in this context and that this interest demands that federal law displace state law and removal jurisdiction be available. The government concurs with all but the last part of this argument. The government agrees that OPM's administrative review scheme is exclusive, and that claims within its scope cannot be pursued in the courts (either state or federal) in the first instance. The government believes that judicial challenges to denials of claims can be brought against OPM alone, under the APA, after exhausting administrative remedies. And the government shares petitioner's concern that evasions of this process could adversely affect federal employees and their health benefit plans. All of that explains why petitioner may have a strong preemption *defense* in state court. But none of it establishes complete preemption. See *Caterpillar*, 482 U.S. at 398 ("The fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted * * * does not establish that they are removable to federal court."). To satisfy the well-pleaded complaint rule, there must be an exclusive federal cause of action within the original jurisdiction of the federal courts into which the state-law claim can be transformed. *Rivet*, 522 U.S. at 476. There is no such federal cause of action here.

II. A PRIVATE CARRIER THAT CONTRACTS TO PROVIDE HEALTH INSURANCE TO FEDERAL EMPLOYEES UNDER FEHBA IS NOT "ACTING UNDER" A FEDERAL OFFICER WITHIN THE MEANING OF 28 U.S.C. 1442(a)(1)

Section 1442(a)(1) affords a right of removal to "any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office." 28 U.S.C. 1442(a)(1). The federal officer removal statute permits removal even when the federal question arises only by way of a defense to a state-law claim. See *Jefferson County* v. *Acker*, 527 U.S. 423, 431 (1999). For a private party to secure removal under Section 1442(a)(1), however, the defendant must be "acting under" a federal officer. A private person acts under a federal officer within the meaning of the statute only when that person acts on behalf of the federal officer under delegated authority, or by "assist[ing]" or "help[ing] carry out" the official "duties or tasks of the federal superior." *Watson* v. *Phillip Morris Cos.*, 551 U.S. 142, 152 (2007) (emphasis omitted). Petitioner cannot satisfy that test.

A. The Text, History, And Purposes Of Section 1442(a)(1) Make Clear That Removal By Private Parties Is Permitted Only When They Act On Behalf Of A Federal Officer Under Delegated Authority Or By Assisting In The Performance Of His Official Duties

1. As the Court has recounted on many occasions, most recently in *Watson*, the current version of the federal officer removal statute is the end-product of a series of congressional enactments beginning in the early years of our Nation's history. See *Watson*, 551 U.S. at 147-148; *Willingham* v. *Morgan*, 395 U.S. 402, 405-406

(1969). The early statutes were passed in response to state-court hostility directed at certain unpopular federal laws and the federal officers charged with enforcing them. See *id.* at 405 (first removal statute prompted by trade embargo with England "over the opposition of the New England States, where the War of 1812 was quite unpopular"); *ibid.* (removal statute enacted after South Carolina declared federal tariff laws unconstitutional and authorized prosecution of federal agents); *id.* at 405-406 (removal statutes adopted to address "cases growing out of enforcement of the revenue laws" during and after Civil War).

Those predecessor statutes authorized removal of civil and criminal state-court actions brought against certain classes of federal officers, such as customs collectors and revenue officers, as well as persons assisting those officers in performing their official duties. Act of Feb. 4, 1815, ch. 31, §§ 6, 8, 3 Stat. 197-198 (removal by a federal customs officer and "any other person aiding or assisting" him); Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633 (removal by "any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States"); Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171-172 (removal of suit against revenue officer "on account of any act done under color of his office," or "any person acting under or by authority of any such officer" "for the collection of taxes"). In *Davis* v. *South Carolina*, 107 U.S. 597 (1883), removal was permitted when a corporal of the United States infantry was detailed to assist a revenue officer in making an arrest under the revenue laws. The Court held that "the protection which the law thus furnishes to the marshal and his deputy, also shields all who lawfully assist [a revenue officer] in the perform-

ance of his official duty." *Id.* at 600; see *Maryland* v. *Soper*, 270 U.S. 9, 30 (1926) (rejecting removal jurisdiction but noting that a private person acting "as a chauffeur and helper to [prohibition officers]" during a distillery raid would be entitled to removal to the same extent as the officers).

In 1948, Congress expanded the right of removal to encompass all federal officers. Act of June 25, 1948, ch. 646, § 1442, 62 Stat. 938.[5] The House Report described the amendment as "extend[ing removal] to apply to all officers and employees of the United States or any agency thereof." H.R. Rep. No. 308, 80th Cong., 1st Sess. A-134 (1947). But "[w]hile Congress expanded the statute's coverage to include all federal officers, it nowhere indicated any intent to change the scope of words, such as 'acting under,' that described the triggering relationship between a private entity and a federal officer." *Watson*, 551 U.S. at 149.

In *Watson*, this Court summed up the historical understanding: to be "acting under" a federal officer, a private person must be involved in "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." 551 U.S. at 152; cf. *City of Greenwood* v. *Peacock*, 384 U.S. 808, 824 (1966) (interpreting related removal provision as permitting private party to remove only when "authorized to act with or for [federal officers] in affirmatively executing duties under any federal law"). The surrounding statutory text confirms that understanding by speaking in terms of acts performed "under color of [federal] office." 28 U.S.C. 1442(a)(1).

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[5] With the exception of a 1996 revision made in response to the Court's decision in *International Primate Protection League* v. *Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), that codification controls today.

A private entity can be said to be acting "under color of federal office" only when it is exercising or assisting in the exercise of official authority in carrying out a government function.

2. That reading effectuates the purposes of the federal officer removal statute, without unduly intruding on federal-state relations. For over a century, such statutes have been grounded in the overriding concern that "[s]tate-court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials," *Watson*, 551 U.S. at 150; because the federal government "can act only through its officers and agents," if "those officers can be arrested and brought to trial in a State court, * * * the operations of the general government" would suffer. *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1880). In response to those concerns, Section 1442(a)(1) and its predecessors were enacted "to provide a federal forum for cases where federal officials must raise defenses arising from their official duties." *Willingham*, 395 U.S. at 405; see *Mesa* v. *California*, 489 U.S. 121, 137 (1989); *Arizona* v. *Manypenny*, 451 U.S. 232, 241 (1981). Indeed, "one of the most important" reasons for removal is to have a federal court adjudicate official immunity defenses. *Watson*, 551 U.S. at 150 (quoting *Willingham*, 395 U.S. at 407); see *Manypenny*, 451 U.S. at 242. A suit against a private person implicates those concerns when he is "act[ing] as an assistant to a federal official in helping that official to enforce federal law" or to "perform[] * * * his official duty." *Watson*, 551 U.S. at 151 (citation omitted).

As the history and purpose of the removal statute suggest, the basis for federal officer removal continues to be most obviously implicated when private persons are aiding law enforcement activity. For example, in

Camacho v. *Autoridad de Telefonos,* 868 F.2d 482 (1st Cir. 1989), telephone companies participated in the wiretapping of certain phone lines under the direction of federal agents. Because the companies were assisting federal officers engaged in "official government business," and were doing so at "federal behest," the court properly held that they were "acting under" federal officers within the meaning of the statute. *Id.* at 486; cf. *Venezia* v. *Robinson,* 16 F.3d 209 (7th Cir.) (removal by state employee who solicited bribe as part of sting operation conducted by FBI agents), cert. denied, 513 U.S. 815 (1994).

The removal statute has also been applied outside the law enforcement context to private persons acting on behalf of the federal government, assisting in the performance of official duties or exercising delegated authority. For example, removal was available to the inspector of an aircraft engine who was named by the Director of the Federal Aviation Administration as a "designated manufacturing inspection representative" pursuant to the Director's statutory authority to "delegate to any properly qualified private person." *Magnin* v. *Teledyne Cont'l Motors*, 91 F.3d 1424, 1428 (11th Cir. 1996) (citation omitted). Likewise, a bank designated as a "depository and financial agent" of the United States providing banking services on a military base under the authority of the Secretary of the Treasury asserted at least a "colorable" claim of "acting under" a federal officer. *Texas* v. *National Bank of Commerce*, 290 F.2d 229, 231-232 (5th Cir.), cert. denied, 368 U.S. 832 (1961).

B. Private Carriers That Contract With The Federal Government To Provide Health Insurance To Federal Employees Under FEHBA Are Not "Acting Under" A Federal Officer

This Court has not decided "whether" or "when" private contractors come within the terms of the federal officer removal statute. *Watson*, 551 U.S. at 154. In *Watson*, the Court held that simple compliance with the law—even when a regulatory scheme entails a high level of detail, supervision, and monitoring—is not sufficient to place a private party within the scope of "acting under." *Id.* at 152-153. In explaining why a government contractor case could present a different situation, the Court observed that private contractors "help[] the Government to produce an item that it needs" and, "at least arguably," some may perform a job "that, in the absence of a contract with a private firm, the Government itself would have had to perform." *Id.* at 153-154. The Court distinguished on that basis a case involving a contractor that supplied the government with Agent Orange to help conduct the war in Vietnam. *Ibid.* (discussing *Winters* v. *Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998), cert. denied, 526 U.S. 1034 (1999)). The Court found that distinction "sufficient" "[f]or present purposes," but did not decide "whether and when particular circumstances may enable private contractors to invoke the statute." *Id.* at 154.

Those circumstances should be no different than for other private parties. To the extent a private contractor can be deemed to be acting on behalf of the government, assisting in the performance of its official duties or exercising delegated authority, the "acting under" prerequisite would be satisfied. Mere compliance with detailed contractual terms, however, does not render a private

party an agent of the federal government, any more than compliance with detailed and pervasive federal regulations does.

As this Court recognized, an expansive interpretation of "acting under" would "potentially" bring a wide variety of state-court actions within the scope of the federal officer removal statute, and so within the sphere of federal judicial power. *Watson*, 551 U.S. at 153. Although not as expansive as the interpretation urged in *Watson*, a reading of "acting under" that encompasses all private parties to detailed and supervised government contracts could materially alter the allocation of federal and state jurisdiction without significantly furthering the historical purposes underlying the federal officer removal statute. There is no need to canvass the full range of contractual relationships and identify those in which removal would be proper. In this case, distinctive features of the FEHBA program serve to separate OPM from the carriers in a way that demonstrates that the carriers are not "acting under" OPM for purposes of the removal statute.

FEHBA reflects Congress's judgment to award contracts annually on a competitive and arms-length basis to carriers prepared to offer attractive benefits packages to federal employees. Congress sought to "ensure maximum health benefits for employees 'at the lowest possible cost to themselves and to the Government.'" *Doe* v. *Devine*, 703 F.2d 1319, 1329 n.41 (D.C. Cir. 1983) (R.B. Ginsburg, J.) (quoting H.R. Rep. No. 957, 86th Cong., 1st Sess. 4 (1959)). Accordingly, a FEHBA carrier "freely enters into the market, in which * * * carriers 'compete vigorously' with other providers for customers within the pool of federal employees." *Houston Cmty. Hosp.* v. *Blue Cross & Blue Shield of Tex., Inc.*,

481 F.3d 265, 272 (5th Cir. 2007) (citation omitted) (holding that a Blue Cross Blue Shield subsidiary did not perform a government function for purposes of official immunity when it participated in FEHBA). When a carrier enters into a contract with OPM, it bears the underwriting risk "to provide health benefits * * * whether or not the sum of the charges [for benefits] exceed[s] the sum of the subscription income." *Christiansen* v. *National Sav. & Trust Co.*, 683 F.2d 520, 523 (D.C. Cir. 1982) (asterisks and brackets in original) (citation omitted).[6]

Carriers thus act in a private capacity to offer health insurance coverage and pay benefits for the employees of the federal government, just as they do for the employees of companies in the private sector. A carrier does not do the work of the government in providing insurance coverage to federal employees, any more than it does the work of a private corporation in providing coverage to the corporation's employees. See *Hayes* v. *Prudential Ins. Co.*, 819 F.2d 921, 922 (9th Cir. 1987) ("[T]he United States does not act as an insurer."), cert. denied, 484 U.S. 1060 (1988). A carrier is an independent party that has entered into a contractual relationship for agreed-upon remuneration. It is not exercising, nor has the government granted it authority to exercise, any public powers.

A comparison with the role of insurance companies as carriers and fiscal intermediaries under the Medicare program (see Pet. Br. 45 n.3) underscores this fundamental point. Medicare is a health insurance program established, maintained, and underwritten by the fed-

[6] The underwriting risk assumed by the plans is offset in a number of ways but, as petitioner acknowledges (Pet. Br. 54 n.5), it is not eliminated altogether. *Christiansen*, 683 F.2d at 523.

eral government itself. To administer the program, the Center for Medicaid and Medicare Services in the Department of Health and Human Services "delegates a portion of its statutory functions to private carriers under 42 C.F.R. § 421.5(b)." *Houston Cmty. Hosp.*, 481 F.3d at 272-273. By virtue of this delegation, carriers and fiscal intermediaries, *inter alia*, make initial benefit and reimbursement determinations on behalf of the government. See *Your Home Visiting Nurse Servs.* v. *Shalala*, 525 U.S. 449, 451 (1999) (fiscal intermediaries under Medicare act as the "Secretary's agent"); *Schweiker* v. *McClure*, 456 U.S. 188, 190 (1982) (explaining that private insurance carriers act "on [the Secretary's] behalf" in administering payment of Part B claims).

In contrast, FEHBA carriers perform no such outsourced government tasks, exercise no delegated authority, and never act on behalf of OPM. They function as private and independent economic entities that offer and run their own health insurance plans. The employing agency does determine whether an employee is eligible to enroll and forwards the election to the carrier. But that is just an initial gateway function to assure that the employee has the requisite employment relationship and other qualifications to participate. The carrier's obligation to pay benefits to the enrollee under the plan then flows from the terms of its contract.

Nothing relating to OPM's administrative review process affects this analysis. As described earlier, OPM may demand that the carrier pay benefits on a particular claim if administrative review reveals that these benefits are due under the contract. But that is simply the consequence of a term in the carrier's contract with OPM, as required by 5 U.S.C. 8902(j), which enables

OPM to supervise contractual performance. The carrier acts independently, by means of its own internal processes and rules, in deciding claims presented to it and thereby fulfilling its own contractual obligations. OPM's role in enforcing the carrier's compliance with contract terms does not transform the carrier into a governmental agent, exercising delegated power or assisting the government in performing public functions. *Watson*, 551 U.S. at 157 ("neither Congress nor federal agencies normally delegate legal authority to private entities without saying that they are doing so"). The private insurance carrier remains just that, performing under the terms of its contract with the government as it would with any other party.[7]

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[7] Because petitioner is not "acting under a federal officer" within the meaning of Section 1442(a)(1) when it performs under the terms of its contract with OPM, the Court need not decide whether there is a "'causal connection' between the charged conduct and asserted official authority," *Acker*, 527 U.S. at 431 (citation omitted). The case-by-case approach to that question adopted by the court of appeals (Pet. App. 3a-4a), however, threatens to impair, rather than protect, government operations. The evidentiary hearing envisioned by the court would require inquiry into governmental decision-making in a suit in which the government is not a party, and would result in a needless expenditure of government resources serving only to delay adjudication of the merits in the proper forum.

CONCLUSION

The judgment of the court of appeals should be vacated and remanded with instructions that the case be remanded to state court.

Respectfully submitted.

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